October 16, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeals

Name of Petitioner: L. Daniel Glass

Date of Filing: February 27, 2006

Case Number: TFA-0150

On February 27, 2006, L. Daniel Glass (the Appellant) filed an Appeal from a final determination that the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued on January 30, 2006. BPA's determination responded to a request for a specific document that Appellant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, BPA released the document with portions redacted. In his Appeal, the Appellant challenges BPA's redaction of the requested document. If granted, this Appeal would require BPA to produce the subject document in its entirety.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 3, 2006, the Appellant filed a FOIA request for a "copy of Dean Landers report." Request Letter dated January 3, 2006, from Appellant to Vickie Van Zandt, BPA. Mr. Landers, a BPA employee, had prepared a report of workplace controversies at BPA brought forward by concerned employees. Determination Letter dated January 30, 2006, from Christina J. Brannon, FOIA Officer, BPA, to Appellant. In the Determination Letter, BPA withheld portions of the report under Exemptions 5 and 6 of the FOIA. In his Appeal, the Appellant claims that the material sent to him does not answer his questions and is not in the "spirit of the [FOIA] as it applies to [him]." Appeal Letter dated February 23, 2006, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

A. Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. The privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

BPA has withheld portions of the requested document from the Appellant, claiming that those portions contain information that is predecisional and part of the deliberative process. We have reviewed the document and believe that the portions BPA withheld were properly withheld under Exemption 5. There is factual information in the document, but it is so intertwined as to make segregation virtually impossible. Further, the factual information in question was selected from a larger quantity of factual information such that the selection would reveal the deliberative process. The report was prepared by Mr. Landers who interviewed many individuals but only provided selected information in his report. Release of the factual information in the document would reveal Mr. Landers' thought processes.

The fact that material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. Although the public does have a general interest in learning about the subject matter of the document, we find that interest to be attenuated by the fact that the withheld material is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would not be in the public interest.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order

to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See also Frank E. Isbill*, 27 DOE ¶ 80,215 (1999); *Sowell, Todd, Lafitte and Watson LLC*, 27 DOE ¶ 80,226 (1999) (*Sowell*).

BPA applied Exemption 6 to the report to withhold the identities of individuals (1) who were interviewed by Mr. Landers, (2) who brought their concerns forward to management, (3) against whom allegations were made, and (4) who gave or received monetary awards. In addition, BPA withheld Mr. Landers' personal telephone number and electronic mail address. Applying these standards to the facts of this case, we believe that the individuals whom Mr. Landers interviewed and who brought their concerns to management have a significant interest in maintaining the confidentiality of their opinions and comments. It is our belief the individuals would expect such opinions to be kept confidential within the confines of the DOE and its contractors. Dissemination of their names would lead to less candor in any similar investigation in the future. *Cappabianca v. Commissioner, United States Customs Service*, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (witnesses and co-workers have substantial privacy interest in the nondisclosure of their participation in an investigation for Exemption 6 purposes). Therefore, we find that there is a significant privacy interest in the identities of both those individuals interviewed by Mr. Landers and those who brought their concerns to management. Similarly, the individuals against whom allegations were made and who received awards maintain a privacy interest in having their identities remain confidential. Even though these individuals were not guaranteed confidentiality, they would not want the allegations made against them or the awards they received disseminated to the general public. It is our belief that they would expect such information to be kept confidential within the confines of the DOE and its contractors. Finally, Mr. Landers has a significant expectation of privacy regarding his personal telephone number and e-mail address.

Moreover, release of this information would not further the public interest by shedding light on the operations of the federal government. Although the information might provide insight into the opinions of the Appellant's previous co-workers, the identities of those individuals who were interviewed would not further the public interest as their names would not shed light on the operations of the federal government. Also, releasing Mr. Landers' telephone number and e-mail address would not illuminate the workings of the federal government.

We find that release of the information withheld by BPA pursuant to Exemption 6 would constitute a clearly unwarranted invasion of personal privacy. There is a significant privacy interest in maintaining the confidentially of the withheld information. Further release of this information would not shed light on the operations of government. Thus, BPA correctly applied Exemption 6 in withholding this document.

III. Conclusion

BPA properly withheld the information contained in the Landers report under Exemption 5. In addition, BPA properly invoked Exemption 6 to withhold names and other personnel identifiers in the document. Based on the reasons stated above, we will denied the Appeal.[*/]

It Is Therefore Ordered That:

(1) The Appeal filed on February 27, 2006, by L. Daniel Glass, Case No. TFA-0150, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 16, 2006

[*/] In his Appeal, the Appellant states that the document, which BPA released, does not answer his questions. We note that the FOIA is not a mechanism for answering questions. Under the FOIA, agencies are required only to release non-exempt, responsive documents; they are not required to answer questions about an agency's operations. *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).